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No. 88-866

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

QUANTUM CHEMICAL CORPORATION,
Petitioner,

v.

PATRICIA L. PRATT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

(1) While Petitioner-Defendant phrases its first question in terms of a right to trial by jury, the only question presented in Defendant's Petition is whether the instructions given to the jury in the District Court properly stated Ohio's common law concerning an intentional tort claim by an employee against an employer.

(2) There is no issue in this case as to whether a Federal Appeals Court, sitting in diversity, must decide cases in accordance with the law stated in the most recent decisions of the Ohio Supreme Court, since the Court of Appeals *expressly* decided the issues of law in this case in accordance with the most recent decisions of the Ohio Supreme Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	IV
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	10
I. The Trial Of This Case Was Fully Determined By A Jury, And The Appeals Court Specifically Held That The Determinations Made Against The Defendant Were Fully Within The Province Of The Jury As The Trier Of Fact	10
II. The Sixth Circuit's Decision Does Not Conflict With The Law Of The State Of Ohio, And In Fact, The Sixth Circuit Expressly Applied The Law Of Ohio, Including The Most Recent Decisions Of The Ohio Supreme Court	13
CONCLUSION	14
APPENDIX	
Order	1a
Jury Question	2a
Opinion of United States Court of Appeals for the Sixth Circuit, August 1, 1988 (853 F.2d 1329 (6th Cir. 1988))	3a-25a

TABLE OF AUTHORITIES

Page

Cases

Jones v. *V.I.P. Development*,
15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984) 3, 11

Kunkler v. *Goodyear Tire & Rubber Co.*,
36 Ohio St. 3d 135, 522 N.E.2d 477 (1988) 6

Pariseau v. *Wedge Products, Inc.*,
36 Ohio St. 3d 124, 522 N.E.2d 511 (1988) 6

Pratt v. *National Distillers & Chemical Corp.*,
853 F.2d 1329, 1336-1338 (6th Cir. 1988) 2, 9, 11, 13

Van Fossen v. *Babcock & Wilcox Co.*,
36 Ohio St. 3d 100, 522 N.E.2d 489 (1988) 6, 13

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OPINIONS BELOW

In addition to the Opinion of the Court of Appeals, the Order of the Court of Appeals denying Defendant's petition for rehearing and for a rehearing *en banc*, and the Opinion of the District Court which are contained in the appendix to Defendant-Petitioner's brief, we have included in the appendix to Plaintiff-Respondent's brief a copy of the Order of the Court of Appeals denying Defendant's Motion for Reconsideration (Appendix, page 1a), and a copy of the inter-

rogatory answer wherein the jury found that Plaintiff's husband died as a result of an intentional tort committed by Defendant (Appendix, page 2a). The official citation of the Court of Appeals Opinion is *Pratt* v. *National Distillers & Chemical Corp.*, 853 F.2d 1329 (6th Cir. 1988), which also is included in the appendix to Plaintiff-Respondent's brief (Appendix, pages 3a-25a).

CONSTITUTIONAL PROVISIONS INVOLVED

Plaintiff-Respondent respectfully submits that the Petition neither raises or involves any constitutional issue or provision.

STATEMENT OF THE CASE

This diversity action for wrongful death, based solely on Ohio law, was brought by Plaintiff-Respondent, Patricia L. Pratt, against the Defendant-Petitioner Quantum Chemicals, doing business as Emery Industries (formerly known as National Distillers & Chemical Corporation), to recover compensatory and punitive damages for injuries to, and the ultimate death of, her husband, Paul Pratt. On February 18, 1982, Mr. Pratt sustained second and third degree burns over 80% of his total body surface, and he sustained various shrapnel injuries in an explosion and flashfire at Defendant's chemical plant in Cincinnati, Ohio, which a jury found were caused by the intentional and malicious wrongful acts of the Defendant, his employer. Mr. Pratt lived for 37 days in the Burns Unit at the University of Cincinnati Medical Center, and then died.

The Complaint was filed in the United States District Court for the Southern District of Ohio on February 17, 1983, by Plaintiff on behalf of herself and her three children. No questions of federal law were alleged. Ohio law allows a civil action by an employee against an employer for damages caused by intentional and malicious wrongful acts of the employer, as those terms are defined in Ohio law. On February 22, 1984, on the eve of the first trial set in this action, the District Court granted Defendant's Motion for Summary Judgment holding that Ohio law did not permit an intentional tort action to be maintained by Plaintiff after she had received workers' compensation benefits. Plaintiff appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the decision of the District Court on May 9, 1985. The decision of the Sixth Circuit Court of Appeals was based on *Jones* v. *V.I.P. Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984), wherein the Supreme Court of Ohio directly held that a worker who has received workers' compensation benefits may also maintain a common law civil action against the employer based on an intentional tort. Defendant filed a Petition for a Writ of Certiorari, which was

denied. *None* of the allegedly important questions asserted in that petition has been asserted in the petition presently before this Court.

Thereafter, the District Court, pursuant to Defendant's motion, ordered that the jury trial be bifurcated on the liability and damages issues. The jury trial on the liability issues commenced on January 6, 1986. Three days later, the District Court Judge declared a mistrial because he had committed error in excluding Plaintiff's evidence relating to Defendant's direct knowledge of the explosion hazard to which it had intentionally subjected its workers, while intentionally keeping such knowledge from, and misleading, its workers. The bifurcated jury trial on liability commenced again on February 10, 1986, and resulted in a unanimous jury verdict for Plaintiff. The jury expressly confirmed in an interrogatory its determination that Plaintiff's husband "died as a result of an intentional tort committed by Emery Industries." (See Appendix, page 2a).

The bifurcated trial to the jury on damages began on March 3, 1986, and resulted in a verdict for Plaintiff in the amount of $1,003,028 compensatory damages, and $100,000 in punitive damages. Judgment for said amounts was entered for Plaintiff on March 10, 1986.

The Defendant filed post-trial motions for a directed verdict, for judgment n.o.v., for a new trial, and for a remittitur. While the motions were pending, the Ohio legislature passed a new workers' compensation act, which did not become effective until August 22, 1986, approximately five months after entry of the judgment for Mrs. Pratt. The new act, however, provided that it would apply to all cases then pending in any court. The new act required that damages be determined by the Workers' Compensation Bureau rather than by a jury under Ohio common law, and Defendant claimed that the statute should apply to extinguish Plaintiff's judgment. Six briefs were filed in the District Court regarding the post-trial motions. The District Court Judge refused to

consider Plaintiff's arguments concerning Ohio's constitutional prohibition against retroactive legislation, and other constitutional prohibitions against extinguishment of judgments by subsequent legislation, and held that the statute was retroactive to Plaintiff's judgment. The Judge determined that Plantiff's evidence *was* sufficient to sustain the jury verdict against Defendant on liability for its intentional wrongful acts, even under the stringent standards of the new statute for proving an intentional tort. The Judge further held, however, that Plaintiff's damages would have to be determined by the Workers' Compensation Bureau pursuant to the new statute, rather than by the jury, and reversed the portion of the verdict on damages. (See District Court Opinion reproduced in the Appendix in Petitioner's Brief).

The Defendant appealed the District Court decision upholding the jury's verdict on liability to the United States Court of Appeals for the Sixth Circuit. Defendant raised five issues in its appeal to the Sixth Circuit, in essence claiming that the evidence presented at the trial was insufficient to sustain the verdict against it on the basis of an intentional tort, claiming that it should be granted a setoff against any jury verdict or other award of damages for workers' compensation benefits received by Plaintiff, and claiming that the evidence presented at trial was insufficient to sustain liability for punitive damages. All of those issues were decided against the Defendant by the United States Court of Appeals for the Sixth Circuit; however, the Defendant has *not* raised any of those issues in its Petition for a Writ of Certiorari now pending before this Court.

The Plaintiff also filed an appeal from the decision of the District Court Judge and sought to have her jury verdict on damages reinstated on the basis that Ohio's Constitution expressly prohibits the legislature from passing laws that can retroactively extinguish a substantive right, such as her jury verdict and judgment in the amount of $1,103,000. Plaintiff also asserted that the United States Constitution protects her verdict and judgment from extinguishment by retroactive

legislation. The Sixth Circuit held in favor of Plaintiff on the basis of Ohio's constitutional prohibition against retroactive legislation, and the Court found it unnecessary to address the United States constitutional issue raised by Plaintiff. Defendant has *not* raised any issue in its Petition for a Writ of Certiorari relating to that determination.

After completion of the submission of briefs and oral arguments in the Sixth Circuit Court of Appeals, but prior to any decision being rendered, the Ohio Supreme Court decided three cases bearing on Ohio's common law allowing compensatory and punitive damage claims by an employee against an employer based upon an intentional tort. *Van Fossen* v. *Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 522 N.E. 2d 489 (1988); *Kunkler* v. *Goodyear Tire & Rubber Co.*, 36 Ohio St. 3d 135, 522 N.E.2d 477 (1988); and *Pariseau* v. *Wedge Products, Inc.*, 36 Ohio St. 3d 124, 522 N.E.2d 511 (1988). The Defendant requested the Sixth Circuit to allow it to rebrief and reargue the appeal because Defendant claimed that the new cases "changed" Ohio's common law concerning intentional torts. Defendant claimed that Plaintiff's evidence was insufficient to sustain the jury verdict and that her case should be dismissed. Defendant claimed in the alternative that the recent Ohio cases required different instructions to the jury, and that it should be granted a new trial. The Defendant did *not* raise any constitutional argument or issue of Federal law in its brief, but based its arguments solely on its own interpretation of the recent Ohio cases concerning Ohio's common law. The Sixth Circuit allowed additional briefs relative to a portion of the jury instructions given by the District Court at the trial.

The Plaintiff pointed out in her additional brief that the Ohio Supreme Court expressly refrained from "changing" the law of Ohio in its recent decisions, and that the trial and instructions to the jury in this case were fully in accordance with the recent decisions of the Ohio Supreme Court, as well as with the previous decisions of the Ohio Supreme Court.

After a review of the eight briefs that had been filed by the parties on appeal, and of a trial transcript that exceeded 1,000 pages plus exhibits, the Sixth Circuit issued its unanimous opinion on August 1, 1988, holding for the Plaintiff in all respects. Specifically, the Court held:

(1) That the Ohio Constitution prohibits retroactive application of the new workers' compensation statute to extinguish Plaintiff's judgment and that Plaintiff's claims are governed by the common law of Ohio [no issue has been raised by Defendant in its Petition relative to this determination];

(2) That the Sixth Circuit Court of Appeals sitting in diversity was required to apply Ohio common law to this action as that law existed at the time the Sixth Circuit was to render its decision, which included consideration of all recent Ohio Supreme Court opinions [Defendant seems to claim in its Petition that the Sixth Circuit held just the opposite].

(3) That the Plaintiff presented sufficient evidence to the jury of Defendant's intentional amd malicious wrongdoing to sustain the verdict against Defendant, *and* that the jury instructions, taken as a whole, fully complied with the past and recent decisions of the Ohio Supreme Court [whether the Sixth Circuit was correct in the determination that the jury instructions were proper appears to be the sole issue raised by Defendant in its Petition to this Court];

(4) That Ohio laws does not allow the Defendant a setoff from the verdict for workers' compensation benefits received by the Plaintiff [no issue has been raised by Defendant in its Petition from this determination]; and

(5) That sufficient evidence of Defendant's malice was presented to the jury to sustain the award of punitive damages under Ohio law [no issue has been

raised by Defendant in its Petition relative to this determination].

The Defendant then filed in the Sixth Circuit a petition for a rehearing and suggestion for a rehearing *en banc*. On September 19, 1988, the Sixth Circuit denied Defendant's petition, noting that no active Judge in the Sixth Circuit voted for a rehearing.

Thereafter, on September 29, 1988, Defendant filed a motion for reconsideration in the Sixth Circuit Court of Appeals. The basis for Defendant's motion for reconsideration was that the claims for damages sustained by a co-worker in the same explosion that killed Mrs. Pratt's husband, went to trial in an Ohio state court, and a jury found for the Defendant. Defendant asserted that the instructions given by the trial judge in that case differed from those given in the District Court in this case, and that this somehow demonstrated Defendant's alleged impropriety or inadequacy of the instructions given in the District Court in the instant case. The Sixth Circuit Court of Appeals, after reviewing the additional three briefs submitted by the parties, denied Defendant's motion for reconsideration. (See Appendix, page 1a).

Thereafter, on November 25, 1988, the Defendant filed its Petition for a Writ of Certiorari in this Court. While the Defendant phrases its first issue presented to this Court in terms of deprivation of its right to a trial by jury, the fact is that this entire case was heard and determined by a jury unanimously against the Defendant. In reality, the only issue raised by Defendant involves its disagreement with the Sixth Circuit as to whether the instructions given to the jury properly reflected Ohio common law, and perhaps whether there was sufficient evidence for the jury to find for Plaintiff.

The second issue raised by Defendant in its Petition to this Court implies that the Sixth Circuit refused to consider the most current Ohio Supreme Court decisions regarding an intentional tort. To the contrary, however, the Sixth Circuit expressly considered the recent decisions and held that the jury

instructions given in this case complied with the recent decisions of the Ohio Supreme Court. *Pratt* v. *National Distillers & Chemical Corp.*, 853 F.2d 1329, 1336-1338 (6th Cir. 1988) (Appendix, pages 14a, 17a-23a).

Hence, there are no constitutional issues, federal questions, or other special or important reasons raised in Defendant's Petition for granting certiorari. Even Ohio's common law upon which the Sixth Circuit's decision is based is of little general significance in Ohio, because the legislature passed the new worker's compensation statute that will govern all intentional tort claims against employers *arising* after August 22, 1986, the effective date of the statute. Therefore, the significance of this entire area of law will be short-lived even in Ohio, and certainly does not merit the attention of this Court after the extensive review given in the Courts below. No issue as to Defendant's right to a trial by jury had been raised by Defendant at any previous stage of these proceedings. In fact, it had been Defendant's position in the Court of Appeals that the Plaintiff had no right to a jury trial because the new workers' compensation statute extinguished the right. In reality, the only issue presented to this Court is Defendant's disagreement with the Sixth Circuit's approval of the instructions given to the jury by the District Court, and its disagreement with the unanimous jury verdict for Plaintiff.

REASONS FOR DENYING THE WRIT

The decision below rests entirely upon Ohio law, and does not address any United States constitutional or Federal questions. The decision below does not conflict with any decision of any other Federal Court of Appeals, nor does it conflict with any state court of last resort, and there are no other special or important reasons for this Court to grant the Defendant's Petition for a Writ of Certiorari.

Further, the Defendant mischaracterizes the decision of the Appeals Court below as making findings of fact as to Defendant's intent and knowledge, and wrongly accuses the Court of failing to apply current Ohio common law in rendering its decision. To the contrary, however, the Sixth Circuit expressly held that it was within the province of the jury to determine the issues against the Defendant as it did, and the Sixth Circuit refused to invade the province of the jury. Furthermore, the Sixth Circuit expressly held that the instructions of law given by the trial judge to the jury fully complied with the previous *and* most recent decisions of the Ohio Supreme Court concerning the law applicable to this case.

I. THE TRIAL OF THIS CASE WAS FULLY DETERMINED BY A JURY, AND THE APPEALS COURT SPECIFICALLY HELD THAT THE DETERMINATIONS MADE AGAINST THE DEFENDANT WERE FULLY WITHIN THE PROVINCE OF THE JURY AS THE TRIER OF FACT.

The Defendant's entire argument under sub-section I of the Petition assumes that this case was not determined by a jury, but that the Appeals Court made determinations of fact. To the contrary, however, the Sixth Circuit expressly declined to make determinations of fact and held that it was within the province of the jury to determine the factual issues in this case:

"As the Ohio Supreme Court held in one of the consolidated cases comprising the *Jones* decision, *Gaines* v. *City of Painesville*, a reviewing court should not lightly overturn a jury verdict: 'A reviewing court should be particularly loath to disturb a jury's findings on an issue, such as intent, which is so intimately bound to the interpretation of facts and the demeanor of witnesses.' *Id.* at 96-97, 472 N.E. 2d at 1052. This court has expressed the same hesitation toward tampering with jury findings. *Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) (to overturn a jury verdict, evidence must be such that 'reasonable minds could not differ as to the conclusions to be drawn from the evidence'). We are not to reweigh evidence to reach our own conclusions about the correctness of a jury's decision; our task is simply to determine whether reasonable jurors could, under any theory submitted to them, have resolved the dispute as they did. *Thompson* v. *Bass*, 616 F.2d 1259, 1267 (5th Cir., *cert. denied*, 449 U.S. 983, 101 S. Ct. 399, 66 L.Ed. 2d 245 (1980).

Thus, after reviewing the evidence and in deference to these admonitions, we affirm the jury verdict on this issue [liability]." (*Pratt* v. *National Distillers & Chemical Corp.*, 853 F.2d 1329, 1337 (6th Cir. 1988)).

Defendant refers to statements from the Appeals Court's opinion as to what the jury "could" have found from the evidence presented at the trial. Defendant makes the goundless assertion that the Appeals Court made determinations of fact based on what the Court felt that the jury "could" have found. The above-referenced quote from the Court's opinion, however, demonstrates that the Court did not decide any questions of fact, but specifically held that there was sufficient evidence presented at trial so that the *jury* "could" find for the Plaintiff, as it did (or it "could" have found for the Defendant, depending on which side the jury believed to be credible). The Court stated that sufficient

evidence was presented to the jury from which it could infer that Emery's procedures were hazardous, that Emery *knew* of the explosion hazard, that Emery *knew* its workers were *kept* ignorant of any explosion hazard, and that it *knew* its workers were guessing at the addition of critical amounts of water and other chemicals to the explosive mixture. The Court did not decide these factual issues. It simply held that sufficient evidence of the hazard and actual knowledge was presented to the jury where it could find under the instructions given by the District Court, that the Defendant committed an intentional tort, depending upon which side of the case the jurors believed. *Id.* at 1336-1338.

Therefore, Defendant's Argument I is without merit because it is rebutted directly by the opinion of the Appeals Court below.

II. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE LAW OF THE STATE OF OHIO, AND IN FACT, THE SIXTH CIRCUIT EXPRESSLY APPLIED THE LAW OF OHIO, INCLUDING THE MOST RECENT DECISIONS OF THE OHIO SUPREME COURT

Defendant accuses the Sixth Circuit Court of Appeals of refusing to apply Ohio's law in accordance with recent decisions from the Ohio Supreme Court. To the contrary, however, the Sixth Circuit expessly analyzed and applied to this case all decisions of the Ohio Supreme Court that addressed an intentional tort action by an employee against an employer. *Pratt* v. *National Distillers & Chemical Corp.*, 853 F.2d 1329, 1336-1338 (6th Cir. 1988) (Appendix, pages 14a, 17a-23a). The Sixth Circuit expressly held that the jury instructions given in the District Court fully complied with Ohio law, including the recent decisions of the Ohio Supreme Court:

> "The jury instructions, as a whole, were firmly consistent with the *Van Fossen* rule." (*Id.* at 1338—as to sufficiency of the evidence under *Van Fossen*, see p. 1336).

Therefore, the Defendant's argument under II does not raise an issue of any disregard by the Sixth Circuit of the recent decisions of the Ohio Supreme Court because the Sixth Circuit expressly discussed, applied, and followed those decisions. Defendant's argument is nothing more than its disagreement with the analysis and conclusion of the Sixth Circuit that the jury instructions which were given at the trial did in fact comply with the requirements of Ohio common law, and that it was within the realm of the jury, as the finder of fact, to determine the facts in favor of Plaintiff, as it did. Therefore, Defendant's argument II does not raise an important or special issue, or other reason for this Court to grant a writ of certiorari.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit rests entirely upon its review of the extensive trial record and its finding that the jury was properly instructed in accordance with Ohio common law, and that there were sufficient facts presented to the jury to allow a factual determination that the Plaintiff's husband died as a result of an intentional tort committed by Defendant. There are no constitutional issues, federal questions, conflicts with any state court of last resort, conflicts with any federal court, or other special or important reasons for this Court to grant Defendant's Petition for a Writ of Certiorari. Accordingly, the Petition should be denied.

Respectfully submitted,

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APPENDIX 1

Nos. 86-3971
86-3972

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA L. PRATT, ETC.,
Plaintiff-Appellee,
Cross-Appellant,

vs.

NATIONAL DISTILLERS AND CHEMICAL CORPORATION, ETC.,
Defendant-Appellant,
Cross-Appellee.

ORDER

Upon consideration of the appellant's motion to reconsider the Court's order of August 1, 1988, and the appellee's response in opposition thereto, and the appellant's reply to the opposition,

IT IS ORDERED that the motion be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
/s/ LEONARD GREEN,
Clerk

APPENDIX 2

JURY QUESTIONS

1. Do you unanimously find that Paul Pratt died as a result of an intentional tort by Emery Industries?

Yes X No. __

If you have answered "Yes" please use verdict form I.
If you have answered "No" use verdict Form II.

/s/ JESSY COMBS

APPENDIX 3

PATRICIA L. PRATT, Plaintiff-Appellee, Cross-appellant,

v.

NATIONAL DISTILLERS & CHEMICAL CORPORATION, Defendant-Appellant,

Nos. 86-3971, 86-3972.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 5, 1987.
Decided Aug. 1, 1988.

Plaintiff brought intentional tort action against her husband's employer to recover compensatory and punitive damages for injuries to and death of her husband. The United States District Court for the Southern District of Ohio, Carl B. Rubin, Chief Judge, entered verdict for plaintiff on liability issue, and granted judgment notwithstanding verdict for defendant on issue of damages. Employer appealed, and plaintiff cross-appealed. The Court of of Appeals, Keith, Circuit Judge, held that: (1) new Ohio workers' compensation statute could not be applied retroactively to action; (2) plaintiff presented sufficient proof from which jury might infer that employer's procedures were hazardous and that employer committed intentional tort; (3) instruction, which stated that defendant who fails to warn of known defect or hazard which poses grave threat of injury may reasonably be considered to have acted despite belief that harm is substantially certain to occur, was proper; and (4) employer was not entitled to set off against jury verdict items employer already paid to employee through workers' compensation.

Reversed in part and affirmed in part.

1. Workers' Compensation — Key 58*

New Ohio workers' compensation statute, which relegates to newly created Ohio Industrial Commission all damages determinations in intentional tort actions, between employers and employees, could not be applied retroactively to action in which jury verdict was rendered but posttrial motions were pending; Ohio's constitutional ban against retroactive legislation is applicable to laws which are substantive, and new statute affected substantive rights to common-law definition of intentional tort and to jury trial. Ohio R.C. § 4121.80; Ohio Const. Art. 2, § 28.

2. Death — Key 75

Plaintiff presented sufficient proof in intentional tort action under Ohio law brought against employer of plaintiff's decedent from which jury might infer that employer's procedures were hazardous and that employer committed intentional tort which led to explosion of chemical press at workplace which caused death of plaintiff's decedent; plaintiff introduced testimony that employer knew that workers were guessing at amounts of water and chemicals they added to chemical press during treatment procedures, and there was evidence to show that employer knew of hazard, knew that employees were exposed to risk and acted to require employees to continue performing their tasks.

3. Federal Court — Key 847

Reviewing court is not to reweigh evidence to reach own conclusion about correctness of jury's decision, but its task is simply to determine whether reasonable jurors could, under any theory submitted to them, have resolved dispute as they did.

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* Refers to West Key Number System.

4. Torts — Key 28

Instruction in intentional tort action brought against employer which stated that defendant who fails to warn of known defect or hazard which poses grave threat of injury may reasonably be considered to have acted despite belief that harm is substantially certain to occur was proper under Ohio law, despite contention that failure to warn cannot give rise to knowledge requirement for intentional tort; jury instruction taken in context announced requirement that defendant know that his actions were substantially certain to cause injury and that negligence or recklessness did not amount to intentional wrong.

5. Workers' Compensation — Key 2243

Employer was not entitled under Ohio law to set off items employer already paid to employees through workers' compensation against jury verdict in intentional tort action brought against employer for fatal injuries sustained by employee.

6. Death — Key 93

Plaintiff was entitled to punitive damages under Ohio law in intentional tort action brought against employer of plaintiff's decedent for fatal injuries sustained when chemical press exploded at workplace; plaintiff was not required to show deliberate intent to injure to support award as employer claimed, and evidence was sufficient to permit reasonable jurors to conclude that employer knew that its operations posed grave danger to lives of its employees and therefore, its failure to adequately warn employees and to modify its procedures was conduct sufficiently evidencing at least ill will or reckless disregard of consequences.

Mark A. Vander Laan (argued), Patrick D. Lane,

Dinsmore & Shohl, Cincinnati, Ohio, for defendant-appellant, cross-appellee.

R. Guy Taft (argues), Steer, Strauss, White & Tobias, Cincinnati, Ohio, for plaintiff-appellee, cross-appellant.

Before KEITH and MILBURN, Circuit Judges, and EDWARDS, Senior Circuit Judge.

KEITH, Circuit Judge:

Defendant National Distiller & Chemical Corporation, d/b/a Emery Industries ("Emery"), appeals and plaintiff Patricia Pratt cross-appeals the judgment notwithstanding the verdict for defendant on the issue of damages. For the reasons set forth below, we REVERSE the district court's judgment *n.o.v.*, and REINSTATE plaintiff 's damages award, with costs and interest. We AFFIRM the liability portion of the verdict below.

I.

PROCEDURAL HISTORY

This diversity action is based on Ohio law. Mrs. Pratt brought suit in the United States District Court, Southern District of Ohio, to recover compensatory and punitive damages for injuries to, and the death of, her husband, Paul Pratt. On February 18, 1982, Mr. Pratt sustained second and third degree burns over eighty percent of his body and incurred various shrapnel injuries in an explosion and flash fire at Emery's chemical plant. Mr. Pratt died after surviving for thirty-seven days in the burns unit of Cincinnati Medical Center.

The jury trial was bifurcated on the issues of liability and damages. The liability phase began on January 6, 1986. On the third day, a mistrial was declared,[1] and the trial began

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[1] A mistrial was declared because the trial court had excluded certain of plaintiff's evidence relating to fumes which sometimes emanated from the defendant's filter presses. The trial judge found that the existence of fumes related to defendant's knowledge of an explosion hazard, and that the evidence was therefore admissbile.

again on February 10, 1986. The liability phase of the retrial resulted in a verdict for plaintiff. The damages phase began on March 3, 1986, and resulted in a verdict for plaintiff on March 5, 1986, in the amount of $1,003,028 in compensatory damages and $100,000 in punitive damages. After the verdict was rendered, but while post trial motions were pending, the Ohio legislature passed a new workers' compensation statute, Ohio Rev. Code Ann. § 4121.80, which relegates to a newly-created Ohio Industrial Commission all damages determinations in intentional tort actions between employers and employees.[2] That statute became effective on August 22, 1986. On September 19, 1986, the trial court below vacated Mrs. Pratt's damages award and referred her damages determination to the Ohio Industrial Commission, pursuant to the new statute.

On October 20, 1986, plaintiff and defendant each filed a timely appeal. By agreement of the parties, defendant was designated as appellant, and plaintiff was designated as appellee/cross-appellant.

II.

FACTS

Defendant Emery operates a chemical manufacturing plant in Cincinnati. On February 18, 1982, a chemical press exploded, eventually resulting in the death of Paul Pratt, plaintiff's husband. The chemical that was under manufacture at the time is called "9058," a non-polymeric ester[3] used as a base material for plastics and other products. The primary danger in the manufacture of 9058 is that sodium chlorite, a chemical with explosive properties used as an in-

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[2] Ohio Rev. Code Ann. § 4121.80(D) (Page's 1986 Supp.).

[3] An "ester" is a combination of alcohol and acid, which react together to form a viscous synthetic liquid. The ester 9058 is used in plastics as a "plasticizer," imparting flexibility and resiliency to plastics.

dustrial bleach, must be used to bleach the 9058 in order to yield the necessary product color.

On the morning of the explosion that killed plaintiff's husband, sodium chlorite had accumulated in a filter press. Following Emery's procedures, Mr. Pratt's co-worker, Leroy Egan, began blowing air into the filter press to dry the insides of the press so that it could be opened up to scrape the chemicals and impurities that had collected from the filtering plates. Mr. Egan noticed that steam began blowing from the spigots at the bottom of the filter press. He called to Mr. Pratt for assistance in ascertaining the problem. Mr. Pratt and Mr. Egan stood directly in front of the filtering machine, observing the steam spew from the spigots for approximately two and one-half minutes. Suddenly, the steam turned to dark smoke and the filter press exploded into pieces. A flash fire enveloped the workers, severely injuring them both.

The parties agree that the sodium chlorite/ester combination was in the filter press due to the omissions of the operator reasponsible for treating the 9058. The operator failed to add a sufficient amount of mono-sodium phosphate ("MSP") to break down the chlorite build-up and then failed to add a full 6,000-pound water wash to remove the unreacted sodium chlorite from the filter press.

Plaintiff introduced evidence to show that Emery's upper management knew of the explosion hazard of combining sodium chlorite with an ester in a filter press. For example, plaintiff's documents disclosed that several explosions and fires had occurred in the chemical plant when sodium chlorite and an ester combined in a filter press.[4] Reports of these ex-

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[4] Explosions occurred in 1973, 1974, 1978 and 1980, after an insufficient amount of MSP was added to break down the sodium chlorite when an ester was introduced into the filter press. In the 1973, 1974 and 1980 explosions, chlorite was combined with a "polymeric" ester, which cannot sustain the water wash normally used on a "nonpolymeric" ester like 9058. Presumably, then, the dangers associated with explosions are greater with polymeric esters, where the safety water wash cannot be used to eliminate the sodium chlorite build-up.

plosions were circulated throughout Emery's upper management. Management investigators recommended that safety tests be developed to check for the presence of sodium chlorite before esters are allowed to enter filter presses. In mid-1980, Emery developed a chlorite safety test for all esters, stating that it was imperative to run the test on all chlorite-bleached esters because of the known explosion hazard. Several of the company's directors admitted to knowledge of prior explosions and hypothesized that operators would be injured if in the vicinity of such an explosion.

Mrs. Pratt also alleges that Emery's management never told the workers in the plant about the explosion and fire hazard. Emery did warn employees that sodium chlorite was a powerful "oxidizing agent" and should be kept away from combustible materials such as rags and paper. Two of Emery's officials admitted at trial that there is no reference to "explosion" in the manufacturing procedures given to the workers. Plaintiff introduced testimony that the workers did not understand that the caution referring to sodium chlorite as an "oxidizing agent" was in any way related to an explosion hazard and were not aware of the explosion problem. The only specific hazard Emery ever disclosed to the workers was that if sodium chlorite entered a filter press, the workers might be exposed to toxic fumes. The procedures did, however, contain inexplicit warnings such as, "residual chlorite can cause a hazardous situation while pressing."

Emery's area supervisor, Mr. Feinauer, admitted that nothing in Emery's procedures indicated to the workers that there was a potential for explosion with sodium chlorite. Mr. Feinauer stated that he believed that the "hazardous situation while pressing" caution referred only to toxic fumes emanating from the presses. In his accident report for Emery on the explosion in this case, Mr. Feinauer indicated that "lack of hazard awareness" was a cause of the explosion.

Mrs. Pratt also introduced evidence that Emery "intentionally concealed" the explosion hazard from the workers. Her evidence consisted of testimony and documents indicating that a new refining process was developed for 9058

which required a "drying procedure," instead of the usual water wash. While this drying process eliminated the product loss often accompanying a water wash, it produced toxic chlorine fumes and did not remove sodium chlorite from the 9058. Emery's technical manager, Mr. Price, explicitly assured the workers that the drying procedure and the resulting fumes were "safe," even though Mr. Price knew about the explosion problem. In late 1980, in response to operator complaints about breathing fumes, Emery reinstated the water wash procedure for all batches of 9058.

Plaintiff's evidence included memoranda which revealed that tests had been performed by Emery researchers and technicians on the properties of sodium chlorite, the dangers involved in the drying procedure, and the causes of past explosions. Certain of these memoranda were circulated through upper management at Emery, but no information concerning the hazards ever reached the workers; rather, the employees continued to labor under the illusion that the filter presses were safe.

Finally, plaintiff's evidence also suggested that Emery's procedures were not safe because employees were "guessing" at the amounts of MSP and water to add during the treatment process. Emery had provided no method for workers to measure the precise levels of MSP or water needed to remove sodium chlorite from the 9058. The potential for hazard was therefore great, especially because workers apparently had no knowledge of the dangers inherent in their measuring guesswork.

III.

DISCUSSION

Defendant Emery is appealing only the liability portion of the verdict and the punitive damages award and urges this court to consider the appeal in light of the new statute, Ohio Rev. Code Ann. § 4121.80. Emery asks that this court either reverse the liability judgment below or grant a new trial. On

cross-appeal, Mrs. Pratt asks that we reverse the judgment *n.o.v.* granted by the district court and reinstate her damages award. She argues that application of the new statute to extinguish her judgment is a violation of Ohio's constitutional prohibition against retroactive legislation. In its order for a judgment *n.o.v.*, the court below did not address the constitutionality of the retroactive application of the statute to Mrs. Pratt's judgment.

Apart from the main issue of whether § 4121.80 can be applied retroactively to this action, both parties appeal a host of additional issues. Emery argues that Mrs. Pratt has not established a *prima facia* case of intentional tort against Emery; that Emery's liability cannot arise under a "failure to warn" theory; that a self-insured employer such as Emery cannot be liable for items that the employer has already directly compensated the plaintiff for under workers' compensation; and that punitive damages were improperly awarded. Mrs. Pratt also raises several additional arguments on appeal;[5] however, since we decide here to reverse the district court's decision to refer Mrs. Pratt's damages award to the Ohio Industrial Commission, we need not reach her other issues.

A. *Retroactive Application of § 4121.80*

The question of whether § 4121.80 applies retroactively to this action is the crux of both sides' appeals. The new statute

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[5] Plaintiff's additional arguments are: whether application of the new statute to her judgment is a violation of the due process clause of the United States Constitution; whether it was prejudicial error for the court to refuse to instruct the jury on safety requirements imposed on the employer by law; whether it was prejudicial error for the court to exclude plaintiff's evidence of defendant's refusal to provide available safety devices; whether it was prejudicial error for the court to limit the number of plaintiff's expert witnesses at trial to three; whether it was prejudicial for the court to instruct the jury that it could consider punitive damages only in regard to plaintiff's personal injury claim, and not in regard to the wrongful death claim; and whether it was prejudicial error for the court to comment to the jury on the instructions in a manner that supported defendant's closing arguments.

dramatically alters Ohio common law with respect to intentional tort claims between employers and employees in several ways: it limits the amount of damages a plaintiff may recover; it takes the damage determination away from a jury and places it in the province of the Ohio Industrial Commission, a body that decides the amount of the award and pays the plaintiff from a common "intentional tort fund"; and it eliminates the right to recover punitive damages. In addition, the statute defines and codifies the meaning of "intentional tort":

> "Intentional tort" is an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.
>
> * * *
>
> "Substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.

Ohio Rev. Code Ann. § 4121.80(G)(1).

As mentioned above, the statute was enacted after the entry of the jury award in this case, but while post trial motions were under consideration. Defendant argues that this court must apply current Ohio law (the new statute) while the case is on appeal, especially given the Ohio legislature's clear intent when enacting the statute:

> This section applies to and governs any action based upon a claim that an employer committed an intentional tort against an employee *pending in any court* on the effective date of this section and all claims or actions filed on or after the effective date, notwithstanding any provisions of any prior statute or rule of law of this state.

Section 4121.80(H) (emphasis supplied). Since this case was "pending" both now and on the effective date of the statute, defendant argues, this court must review the appeal in light of the new law. Indeed, this circuit has held that a court of appeals sitting in diversity must apply the law of the state as

existing at the time of its decision rather than as it stood at the time the case was decided in district court. *Awrey* v. *Progressive Casualty Insurance Co.*, 728 F.2d 352, 354 (6th Cir. 1984), *cert. denied*, 474 U.S. 920, 106 S.Ct. 250, 88 L.Ed.2d 258 (1985).

[1] We disagree with Emery's claim. We believe that when applied to this case, the new Ohio statute violates § 28, Article II of the Ohio Constitution.[6] The new statute, which applies to all cases "pending" on its effective date (August 22, 1986), is in conflict with Article II, § 28 of Ohio's Constitution, which provides that "[t]he General Assembly shall have no power to pass retroactive laws. . . ." *See United States* v. *McGee*, 714 F.2d 607, 611 (6th Cir. 1983); *Perk* v. *City of Euclid*, 17 Ohio St.2d 4, 244 N.E. 2d 475 (1969).

In *Gregory* v. *Flowers*, 32 Ohio St.2d 48, 53, 290 N.E.2d 181, 184 (1972), the Ohio Supreme Court stated that the state's constitutional ban against retroactive legislation is applicable solely to laws which are substantive—not procedural-remedial—in nature. *See also Wilfong* v. *Batdorf*, 6 Ohio St.3d 100, 103-104, 451 N.E.2d 1185, 1189-89 (1983). Procedural or remedial laws are those "providing rules of practice, courses of procedure or methods of review," or those "prescrib[ing] methods of enforcement of rights or obtaining redress." *French* v. *Dwiggins*, 9 Ohio St.3d 32, 33, 458 N.E.2d 827, 829 (1984). *See also Kiser* v. *Coleman*, 28 Ohio St.3d 259, 242 N.E.2d 658 (1986); *Kilbreath* v. *Rudy*, 16 Ohio St.2d 70, 242 N.E.2d 658 (1968). Laws affecting substantive rights are those which create duties, rights and obligations. *State ex. rel. Holdrige* v. *Industrial Comm'n.*, 11 Ohio St.2d 175, 178, 228 N.E.2d 621, 623 (1967). Thus, if the new law is found to be remedial or procedural in nature, the

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[6] Our analysis does not abolish this circuit's existing rule under *Awrey* that a court must apply the law of the state as it now stands, rather than as it stood at the time the case was decided in the district court. *Awrey's* reach extends only as far as the Ohio Constitution permits. As a result, it can only apply to legislation that is not substantive in nature and therefore not in violation of Ohio's prohibition against retroactive legislation.

court should apply it to this action. If, on the other hand, § 4121.80 has a *substantive* impact—which we believe it has—then the court should not apply it retroactively to this case.

A federal court of appeals in diversity must apply the law of the forum state. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). While this case was on appeal in this court, the Ohio Supreme Court decided four cases which conclusively resolved the retrospectivity question as applied to § 4121.80. In *Kunkler* v. *Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135, 522 N.E.2d 477 (1988), *Van Fossen* v. *Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (1988), and *Pariseau* v. *Wedge Products, Inc.*, 36 Ohio St.3d 124, 522 N.E.2d 511 (1988), that court held that the application of § 4121.80 to pending claims disturbs a substantive right, and therefore is violative of § 28, Article II of the Ohio Constitution.

In *Van Fossen*, the Ohio Supreme Court held that, if applied to actions accruing prior to the new statute's effective date, § 4121.80 would disturb a plaintiff's right to rely upon the common law definition of "intentional tort" as established in Ohio under *Jones* v. *VIP Development Co.*, 15 Ohio St.3d 90, 472 N.E.2d 1046 (1984). Prior to the enactment of § 4121.80, Ohio's definition of "intentional tort" was set out in *Jones* at "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur." *Id.* at 95, 472 N.E.2d at 1051. Section 4121.80 adopts that definition, but adds that " 'substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition of death." § 4121.80(G)(1). According to *Jones*, the employer must have known or believed that his actions were substantially certain to result in the harm to an employee before the intent to injure would have been inferred. The employer's intent, wrote the *Jones* court, "may be inferred from his conduct and surrounding circumstances." *Id.* at 95, 472 N.E.2d at 1051. Thus, specific intent to injure

was not required under *Jones* for a finding of intentional misconduct.

Under § 4121.80(G)(1), however, only the employer who acts with "deliberate intent" to cause the act which results in injury, knowing that his intentional conduct will be substantially certain to cause injury, commits an "intentional tort." The statute therefore requires direct proof of substantially certain conduct, removing the inference permitted under *Jones*. This change in the common law definition places a more onereous burden on plaintiffs to demonstrate a deliberate intent to cause injury. As the Ohio Supreme Court held in *Van Fossen*, 36 Ohio St.3d at 109, 522 N.E.2d at 498:

> § 4121.80(G)(1) would remove appellees' potentially viable, court-enunciated cause of action by imposing a new, more difficult statutory restriction upon appellee's ability to bring the instant action. We therefore hold that this result constitutes a limitation, or denial of, a substantive right, and consequently causes the statute to fall within the ban against retroactive laws established by Section 28 Article II of the Ohio Constitution.

See also Kunkler v. *Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135, 138 522 N.E.2d 477, 480 (1988). Thus, since this is a diversity case and we must defer to Ohio law, we conclude that § 4121.80 was impermissably applied to Mrs. Pratt's action.

Even though the *Van Fossen*, *Pariseau* and *Kunkler* cases make it abundantly clear that § 4121.80 may not be applied retroactively to cases pending on the statute's effective date, one might argue that those cases dealt only with the change in the definition of an intentional tort. In this case, the district court affirmed the liability verdict. An argument could be made, therefore, that if the provisions of the new statute were separately parsed out, the portion of the statute assigning damages to the Ohio Industrial Commisision would be considered remedial in nature, even though the change in definition of intentional tort was held to be substantive. This

distinction is relevant to this case, where the damages verdict is under challenge.

We are fully cognizant of the definitional mire associated with labeling rights as "procedural" or "substantive." These two categories are not rigid boxes, but are subtle and fluid, and depend upon the circumstances of individual cases. Although we acknowledge this definitional awkwardness, Ohio law makes it clear that the damages provision of the new statute affects a second substantive right relevant to this appeal—Mrs. Pratt's right to a trial by jury.

Section 4121.80 affects the right to a jury trial by assigning the damages determination to the Ohio Industrial Commission, snatching the decision from the province of the jury. The right to a jury trial under Ohio law has been held to be a fundamental, substantial right and not merely a question of procedure. *Cleveland Ry. Co.* v. *Halliday*, 127 Ohio St. 278, 283-84, 188 N.E. 1, 3 (1933):

> [T]he right to a jury trial does not involve merely a question of procedure. The right to jury trial derives from Magna Carta. It is reasserted both in the Constitution of the United States and in the State of Ohio. For centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right, and not a procedural privilege. (citations omitted).

See also Freels v. *Dayton Electroplate, Inc.*, No. 85-2031, slip op. at 8 (Ohio Com. Pl. Ct. Jan 1, 1987) (right to a jury trial substantive right under Ohio law; § 4121.80 therefore unconstitutional as applied); *Quick* v. *Sun Refining & Marketing Co.*, No. 820292, slip op. at 3 (Ohio Com. Pl. Ct. Dec. 3, 1986) (same); *Meadors* v. *Zaring Co.*, No. A-8503907, slip Op. at 10 (Ohio Com.Pl.Ct. Oct. 6, 1986), *aff'd*, 38 Ohio App.3d 97, 526 N.E.2d 107 (1987) (same).

At the time the filter press exploded, at the time Mrs. Pratt filed her complaint, and at the time the jury rendered its verdict, there was a common law right in Ohio for an employee to obtain money damages for an intentional tort occurring in the workplace and to have a jury determine the amount of

damages. Under Ohio law, a statute which eradicates a vested right "acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions already passed *must be deemed retrospective.*" *Perk* v. *City of Euclid*, 17 Ohio St.2d 4, 8, 244 N.E.2d 475, 477 (1969). *See also Weil* v. *Taxicabs of Cincinnati*, 139 Ohio St. 198, 39 N.E.2d 148 (1942).

In *Weil*, the Ohio Supreme Court held that a statutory amendment which impairs a common law right of action—even though the statute substitutes a new right to compensation—deals with a vested substantive right, not a remedial right. Such a statute is therefore within the purview of Ohio's constitutional prohibition against the legislative enactment of retroactive laws. In this case, as in *Weil*, the Ohio General Assembly transformed plaintiff's common law right of a trial to a court and jury into a limited determination of part of the claim before a court, followed by an administrative determination of damages. As noted in *Kneisley* v. *Lattimer-Stevens Co.*, No. 86AP-1046 (Ohio Ct. of Appeals Aug. 4, 1987) slip op. at 3 [available on WESTLAW, 1987 WL 15312], "[t]hat type of change is substantive, and cannot be accomplished retroactively."

Thus, § 4121.80 affects two substantive rights: the right to the common law definition of an intentional tort and the right to a jury trial. We therefore reverse the district court's judgment notwithstanding the verdict on this issue and reinstate Mrs. Pratt's damages award.

B. *Sufficienty of Proof of Hazard*

Defendant Emery next argues that plaintiff cannot establish a *prima facie* case of intentional tort without presenting evidence of a hazard in the procedure involved in the accident. Even though we hold that the new statute is not applicable to this action, Emery urges that under Ohio's previous common law (articulated in *Jones* v. *VIP Development Co.*, 15 Ohio St.3d 90, 472 N.E.2d 1046 (1984) and clarified in *Van Fossen*, 36 Ohio St.3d at 116, 522 N.E.2d at

498), Mrs. Pratt failed to present sufficient evidence to prove an intentional tort. As stated above, *Jones* required proof that an injury was substantially certain to occur and that the employer believed that its act was substantially certain to cause injury. *Jones*, 15 Ohio St.3d at 95, 472 N.E.2d at 1051. *Van Fossen* further clarified this standard, holding that:

> [T]he following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within his business operation; (2) knowledge by the employer that if employees are required by virtue of their employment to be subjected to such dangerous process, procedure, instrumentality or condition, then harm to them would be a substantial certainty, and not just a high risk; (3) that the employer, under such circumstances, and with such knowledge, did act to so require the employee to continue performing his employment tasks.

36 Ohio St.3d at 116, 522 N.E.2d at 504.

[2] We believe that Mrs. Pratt presented sufficient proof from which a jury might infer that Emery's procedures were hazardous and that defendant committed an intentional tort.

The jury was asked whether Emery knew an explosion was substantially certain to occur in view of evidence of past explosions, and in view of evidence that Emery was aware that the workers were kept ignorant of any explosion hazard. Plaintiff also introduced testimony that Emery knew that the workers were guessing at the amounts of water and chemicals they added during the treatment procedures. Mrs. Pratt contends, and the jury apparently believed, that no procedure is safe if the persons using the procedure are kept ignorant of the explosive properties of a component chemical. The hazard was in the ignorance of the employees, and in the inability of the employees to follow procedures precisely. Evidence suggested that defendant knew about the problem of imprecision and guessing. Thus, the jury could have found that employee ignorance combined with imprecise methods and hazardous

chemicals presented sufficient evidence of a hazard in the procedure involved in the accident. There was evidence to show that the employer knew of the hazard, knew that the employees were exposed to risk, and acted to require the employees to continue performing their tasks. Thus, under the *Jones* "substantial certainty" test, or under the more precise *Van Fossen* "knowledge" test, the reasonable juror could have found the requisite intent.

[3] As the Ohio Supreme Court held in one of the consolidated cases comprising the *Jones* decision, *Gains* v. *City of Painesville*, a reviewing court should not lightly overturn a jury verdict: "A reviewing court should be particularly loathe to disturb a jury's findings on an issue, such as intent, which is so intimately bound to the interpretation of facts and the demeanor of witnesses." *Id.* at 96-97, 472 N.E.2d at 1052. This court has expessed the same hesitation toward tampering with jury findings. *Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913, 96 S.Ct. 1113, 47 L.Ed.2d 318 (1976) (to overturn a jury verdict, evidence must be such that "reasonable minds could not differ as to the conclusions to be drawn from the evidence"). We are not to reweigh evidence to reach our own conclusions about the correctness of a jury's decision; our task is simply to determine whether reasonable jurors could, under any theory submitted to them, have resolved the dispute at they did. *Thompson* v. *Bass*, 616 F.2d 1259, 1267 (5th Cir.), *cert. denied*, 449 U.S. 983, 101 S.Ct. 399, 66 L.Ed.2d 245 (1980).

Thus, after reviewing the evidence and in deference to these admonitions, we affirm the jury verdict on this issue.

C. *Failure to Warn Instruction*

[4] Defendant's next argument is primarily an objection to a sentence in the jury instructions, drawn from the *Jones* case, which stated: "A defendant who fails to warn of a known defect or hazard which poses a grave threat of injury may reasonably be considered to have acted despite a belief

that harm is substantially certain to occur." Emery argues that a failure to warn cannot give rise to the knowledge requirement in an intentional tort under *Van Fossen*.

The Ohio Supreme Court in *Jones* had held that "[t]he existence of this knowledge or intent on the part of the actor may be inferred from his conduct and surrounding circumstances." 15 Ohio St.3d at 95, 472. N.E.2d at 1051. In *Van Fossen*, that court sought significantly to "limit the areas within which 'intent' on the part of the actor may be circumstantially *inferred*." *Van Fossen*, 36 Ohio St.3d at 117, 522 N.E.2d at 504 (emphasis in original). Indeed, the *Van Fossen* court went on to explain that a "failure to warn," in and of itself, was not sufficient to prove intent:

> There are many acts within the business or manufacturing process which involve the existence of dangers, where management fails to take corrective actions, institute safety measures, or properly warn the employees of the risks involved. Such conduct may be characterized as gross negligence or wantoness on the part of the employer, However, in view of the overall purposes of our Workers' Compensation Act, such conduct should not be classified as "intentional tort" and therefore an exception, under *Blankenship* [v. *Cincinnati Milacron Chemicals, Inc.* 69 Ohio St.2d 608, 433 N.E.2d 572 (1982)] or *Jones*, to the exclusivity of the Act.

Id. There is little question then, given the *Van Fossen* admonition, that a case predicated solely upon an employer's failure to warn employees of a danger would not demonstrate the requisite intent. The jury instruction given in this case, if it was undergirded only by a failure to warn theory, would contravene the *Van Fossen* rule. "Failure to warn," however, was not the sole theory in plaintiff's case. The crux of plaintiff's argument was not simply that the employer did not tell the employees about the dangers, but that the employer *knew* that an accident was substantially certain to occur, *knew* that employees were improperly combining explosive chemicals, and in spite of this knowledge, sanctioned the activity by

allowing it to continue. The sentence regarding a failure to warn could have been viewed by the jurors as but one brick in the house of evidence presented against the defendants, as but one of the surrounding circumstances from which intent might reasonably have been inferred.

Moreover, the jury instruction, taken in context, clearly announced the requirement that the actor *know* that his or her actions were substantially certain to cause injury and that "negligence" or "recklessness" did not amount to an "intentional wrong."

The jury instructions, as a whole, were firmly consistent with the *Van Fossen* rule. We quote at length to provide the context:

> The concept that permeates this case upon which this case is based is the phrase "intentional tort." A tort, by the way, is a civil wrong. An intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur, not merely likely. An intent to injure a specific person is not required.
>
> A defendant who fails to warn of a known defect or hazard which poses a grave threat of injury may reasonably be considered to have acted, despite a belief that harm is substantially certain to occur.
>
> You will note that the intentional tort concept has two different avenues. But in this case, there is only one. I do instruct you that there has been no evidence presented of an intent to injure. That leaves us with the phrase, "substantially certain." That phrase is to be given its ordinary and usual meaning. It is more than likelihood. Substantial means about, or practically, or nearly, almost, essentially or virtually, and certain. Included among the definitions of certain are "sure" and "inevitable." The term "substantially certain" may be restated as "virtually sure" or "nearly inevitable."
>
> *Observe ladies and gentlemen, it is not enough for the*

plaintiff to prove that Emery Industries was negligent. We do not deal in this case with negligence. Negligence is a failure to use ordinary care. Ordinary care is the care that a reasonably prudent person would use under the same or similar circumstances. But it's the element of substantial certainty which distinguishes a negligent act from intentionally tortious conduct.

Where a defendant acts despite his knowledge that risk is appreciable, his conduct is negligent. Where the risk is great, his actions may be characterized as reckless or wanton, but that is not an intentional wrong. The actor must know or believe that harm is a substantially certain consequenses [sic] *of his act before an intent to injure will be inferred.*

The existence of this knowledge or intent on the part of the actor may be inferred from his conduct and surrounding circumstances.

Ladies and gentlemen, the mere knowledge and appreciation of a risk, something short of substantial certainty is not intent.

The plaintiff must establish by a preponderance of the evidence that the death of Paul W. Pratt was caused by an intentional tort.

Joint Appendix 1244-45 (emphasis supplied).

A jury could have inferred from the evidence of Emery's knowledge of the danger, its failure to specifically warn its employees about the explosion hazard, and its knowledge about employees using imprecise procedures in combining chemicals, that Emery was acting with substantial certainty that harm would occur. *Van Fossen* did not completely prohibit the drawing of inferences from circumstantial evidence; it merely restricted the areas within which intent may be inferred. We do not believe that the facts of this case paint the same negligence scenario forbidden by the *Van Fossen* court.

We therefore believe that plaintiff has presented sufficient

evidence that a reasonable jury could find that defendant's acts, including but not limited to its failure to warn, constituted an intentional tort.

D. *Set-Off for Workers' Compensation*

[5] Defendant argues that it should be allowed to set off against the jury verdict the items it already paid to plaintiff through workers' compensation. Emery is self-insured. Emery contends that self-insured employers should be able to subtract workers' compensation payments from any jury verdict to avoid having to pay twice for the harm done. While defendant's argument appears equitable, the Ohio Supreme Court has not accomodated that viewpoint.

The trial judge in this case, relying on *Jones*, held that the employer was not entitled to a set-off for workers' compensation payments. In *Jones*, the Ohio Supreme Court specifically held: "An employer who has been held liable for an intentional tort is not entitled to a setoff of the award in the amount of workers' compensation benefits received by the employee or his representative." 15 Ohio St.3d at 100, 472 N.E.2d at 1055. The court explained that the compensation provided by the workers' compensation law " 'is in the nature of an occupational insurance, and, like general insurance, cannot be deducted and treated as an offset for claims for damages for wrongful death or injury.' " *Id.* at 100, 472 N.E. 2d at 1055 (quoting *Trumbull Cliffs Furnace Co.* v. *Schachovsky*, 111 Ohio St. 791, 146 N.E. 306 (1924)).

This rule has been held applicable to self-insured employers as well. *Balyint* v. *Arkansas Best Freight System*, 18 Ohio St.3d 126, 480 N.E.2d 417 (1985); *Formoso* v. *Plain Dealer Publishing Co.*, 18 Ohio St.3d 138, 480 N.E.2d 426 (1985). Accordingly, we hold that defendant's argument is unsupported by case law and therefore lacks merit.

E. *Punitive Damages*

Finally, defendant argues that punitive damages cannot be awarded in an intentional tort action where plaintiff has not

proven any intent to injure. Again, this question falls within the province of the jury.

[6] Under Ohio law, Mrs. Pratt must prove that Emery acted with "actual malice" before the question of punitive damages may be submitted to the jury. Thus, Emery argues that only a showing of deliberate intent to injure will support an award of punitive damages. This position is directly contrary to Ohio law, as recognized by this court in *Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913, 96 S.Ct. 1113, 47 L.Ed.2d 318 (1976), and by the Ohio Supreme Court in *Leichtamer* v. *American Motors Corp.*, 67 Ohio St.2d 456, 424 N.E.2d 568 (1981). In *Leichtamer*, the court held:

> Actual malice may be inferred from conduct and surrounding circumstances. *Davis* v. *Tunison*, 168 Ohio St. 471 [, 155 N.E.2d 904 (1959)]. Moreover, intentional, reckless, wanton, willful and gross acts which cause injury to person or property may be insufficient to evidence that degree of malice required to support an award of punitive damages in tort actions.

The trial court in this case gave a clear instruction on the requirement of finding actual malice for punitive damages, stating that "[a]ctual malice means anger, hatred, ill will, a spirit of revenge or a reckless disregard of the consequences." Joint Appendix at 1273. We find that the trial court's instruction was a fair statement of the law and that the evidence as outlined above was sufficient to permit reasonable jurors to conclude that Emery knew that its operations posed a grave danger to the lives of its employees, and therefore that its failure adequately to warn employees and to modify its procedures was conduct sufficiently evidencing at least ill will or reckless disregard of the consequences. We conclude that the district court erred in granting the judgment *n.o.v.* of the issue of damages, both compensatory and punitive.

IV.

CONCLUSION

For the reasons stated above, we reverse the district court's grant of a judgment notwithstanding the verdict and reinstate plaintiff's compensatory and punitive damages awards, with costs and interest to be paid by defendant. We affirm the district court on all other issues.